

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSUE ROMERO,
on behalf of himself and
all others similarly situated,
Plaintiff,

v.

ZIP TOP, LLC,
a Texas limited liability company,
Defendant.

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CIVIL ACTION NO. 20cv10189

**DEFENDANT'S OBJECTION AND MOTION TO STRIKE PLAINTIFF'S
UNTIMELY AND PURPORTED MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendant Zip Top, LLC (hereinafter "*Zip Top*" or "*Defendant*"), by and through its counsel, Bradley B. Clark, hereby objects to Plaintiff Josue Romero's ("*Plaintiff*") untimely and *purported*¹ Motion for Summary Judgment and respectfully moves the Court to strike the purported Motion for Summary Judgment. In support thereof, Defendant would show the Court as follows:

**I.
Untimeliness**

1. The Case Management Plan and Scheduling Order [17] provides that "[a]ny motion for summary judgment must be filed *no later than* 10/11/21." (emphasis added) Plaintiff's purported Motion for Summary Judgment [DKT 29] was filed on October 12, 2021, and is therefore

¹ On October 12, 2021, Plaintiff's counsel, Mr. William Downes, filed Plaintiff's "Motion for Summary Judgment." See Docket Sheet for Document No. 29. Although the docket text states "Motion for Summary Judgment" the actual filing is "Plaintiff's Memorandum of Law *in Support of* Motion for Summary Judgment." (emphasis added) [29] Plaintiff never filed a Motion for Summary Judgment much less a *timely* Motion for Summary Judgment. Defendant therefore refers to Document No. 29 as Plaintiff's "purported" Motion for Summary Judgment or "Memorandum of Law."

untimely. Defendant therefore respectfully requests that the Court strike Plaintiff's untimely, purported Motion for Summary Judgment.

II. Pleadings are Not a Motion for Summary Judgment

2. Document No. 29 is not a Motion for Summary Judgment. It is, in name and substance, a memorandum of law in support of a motion for summary judgment that Plaintiff never filed.

3. Plaintiff also filed a *Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment* [30] on October 12, 2021. Like the Memorandum of Law [29], this "statement" is not, in name or substance, a motion for summary judgment ("[p]ursuant to Local Rule 56.1²[,] [P]laintiff Josue Romero ("Plaintiff") submits this Statement of Undisputed Material Facts *in Support of* his Motion for Summary Judgment" (emphasis added)).

III. Prayer

For the foregoing reasons, Defendant prays that the Court strike Documents [29] (Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment), [30] (Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment), and [31] (Declaration of William J. Downes), [31-1] (Plaintiff's First Request for Admissions to Defendant), [31-2] (Declaration of Robert D. Moody), and [31-3] (Declaration of Robert D. Moody) from the record and grant Defendant any and all further relief at law and in equity to which it is entitled.

[signature page follows]

² Section 3D(i) of the October 29, 2020, Individual Practices in Civil Cases for the Hon. Lewis J. Liman, requires "[c]ounsel for a party moving for summary judgment to [] provide all other parties with an electronic copy, in Microsoft Word format, of the moving party's Statement of Material Facts Pursuant to Local Rule 56.1" The undersigned never received a Microsoft Word formatted statement of material facts from Movant's counsel.

Dated: October 28, 2021

Respectfully submitted,

/s/ Bradley B. Clark

Bradley B. Clark

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Attorney for Defendant, Zip Top, LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2021, I served a true and correct copy of the foregoing via electronic filing with the Court's ECF system for notice to all counsel of record.

/s/ Bradley B. Clark

Bradley B. Clark